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No. 85-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

and

RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the racial quota for hiring hall referrals imposed by the courts below—which requires that preferences be given to blacks solely on the basis of their race, and not because they are victims of discrimination, at the expense of innocent whites—is a remedy that courts are authorized to award for a violation of Title VII of the Civil Rights Act of 1964.

2. Whether the racial quota for hiring hall referrals imposed by the courts below—which requires that preferences be given to blacks solely on the basis of their race, and not because they are victims of discrimination, at the expense of innocent whites— is a remedy that courts are authorized to award for a violation of 42 U.S.C. § 1981.

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LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
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RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Local Union 542 of the International Union of Operating Engineers ("the Union"), prays that this Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered in this case on July 17, 1985.[1]

[1] In addition to the parties named in the caption, the following were parties to this action in the District Court, but did not participate in the proceedings before the Court of Appeals: Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware; General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and Penn-

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit dated July 17, 1985 is reported without published opinion at 770 F.2d 1068, and the unpublished opinion is reprinted in the separately bound appendix at Appendix A. That opinion was amended by order of the Court of Appeals on August 13, 1985. The order amending the opinion is reprinted as Appendix B. The judgment of the Court of Appeals dated July 17, 1985 is reprinted as Appendix L. The order and opinion of the United States District Court for the Eastern District of Pennsylvania dated July 24, 1984, are unreported and are reprinted as Appendices C and D. The order of the district court dated September 27, 1984, is unreported and is reprinted as Appendix E. In addition to the above-stated opinions and orders which are the subject of this petition, there are a number of prior opinions and orders in this litigation which are pertinent, at least as background, to the issues raised in this litigation. These prior opinions are reprinted in Appendices F through K. Of these, three opinions of the district court are reported: 469 F. Supp. 329 (1978) (Appendix F); 488 F. Supp. 988 (1979) (Appendix G); 502 F. Supp. 7 (1979) (Appendix H). And, the Appendix includes a prior opinion of the court of appeals that is reported at 648 F.2d 922 (1981) (Appendix I).

JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Third Circuit entered on July 17, 1985. On October 3, 1985, Justice Brennan issued an order extending the time for filing a petition for a writ of certiorari to and including November 14, 1985 (Appendix M). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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sylvania Excavating Contractors Association, on their own behalf and on behalf of all others similarly situated; and Glasgow, Inc., on its own behalf and on behalf of all other contractors similarly situated.

STATUTES INVOLVED

Section 703(c)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c)(2), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> • • • •
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; . . . .

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee,

> or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Section 1 of the Civil Rights Act of 1866, re-enacted with modifications as Section 16 of the Civil Rights Enforcement Act of 1870, 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 3 of the Civil Rights Act of 1866, re-enacted as Section 18 of the Civil Rights Enforcement Act of 1870, as amended, 42 U.S.C. § 1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in

the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The Facts

The instant petition involves solely a question of remedy: whether the racial quotas for hiring hall referrals imposed as part of the injunctive relief in this case are remedies that courts are authorized to award under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The racial quotas at issue here require the Union hiring hall—which provides the exclusive means for operating engineers affiliated with the Union to obtain work in their trade—to give at a minimum a specified percentage of all job referrals to minorities. The Union has five geographical districts, with a separate hiring hall in each district; the required minimum percentage of referrals that must go to minorities differs from district to district. In District 1, by far the largest of the Union's districts, the Union is required to give a minimum of 40% of all job referrals to minorities, although minorities comprise only 13% of the Union's membership in that District.[2] The result of this racial quota—setting aside 40% of the referrals for 13% of the members—is that whites who have been laid off from a job must remain unemployed far longer than com-

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[2] Because for purposes of this quota employer *recalls*, over which the Union has no control, are counted as "referrals," the effective minority quota for hiring hall *dispatches*—the only referrals over which the Union has control—is far in excess of 40%, indeed was found by the Master in this case to be over 70%. See *infra* at 9 n.8, 10-11 and n.12.

parably situated minorities before being dispatched to a job by the hiring hall.

Although this case has had a long and complex history, the facts relevant to the issues presented here are simple and straightforward. In 1971, twelve black plaintiffs and the Commonwealth of Pennsylvania brought a class action employment discrimination suit against the Union, a class of approximately 1,400 construction contractors and other employers who receive referrals through the Union's exclusive hiring hall, and four construction trade associations which represent employers in contract negotiations with the Union. App. 25a.[3] This suit alleged that the defendants had engaged in a number of employment practices violative of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981.[4] Of these allegations, one is pertinent here: that the hiring hall operated by the Union discriminated against minorities in making referrals to jobs of the defendant employers.

In 1978, after a lengthy trial addressed to issues of liability, the district court found that the Union had made job referrals from the hiring hall in an intentionally discriminatory manner in violation of § 703(c)(2) of Title VII, 42 U.S.C. § 2000e-2(c)(2), and 42 U.S.C. § 1981.[5] The essence of the court's findings on this issue is as follows: On its face, the Union's hiring hall system pur-

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[3] On an aspect of this case not relevant here, the Joint Apprenticeship Training Committee, an organization created by Local 542 and the trade associations to provide for the induction of new operating engineers, was also named as a defendant.

[4] The employer and employer association defendants were sued under § 1981 but not under Title VII. In addition to Title VII and § 1981, the complaint alleged that numerous other state and federal laws prohibiting discrimination had been violated. Because none of these grounds was a basis for the district court's finding of liability or its remedy, they are of no relevance here.

[5] The district court also found, *inter alia*, that the Union had discriminated with respect to admission to membership in the Union. App. 58a-64a, 72a-76a, 157a-158a.

ported to base priority for job referrals on the length of time an operating engineer was on the "out-of-work list." According to this system, upon lay-off from a job, an operating engineer would go to the bottom of that list and would gradually work his way up the list as referrals would be offered to those at the top of the list (assuming they possessed the requisite skill to perform the particular jobs being referred), who by definition had been out of work the longest. App. 33a-36a.[6] But, the court found, the Union had not followed its own hiring hall rules. Rather, the court concluded, the hiring hall had been used as a tool for favoritism, to the disadvantage of most blacks as well as many whites. App. 29a-33a, 39a-40a, 66a-71a, 119a-120a.

As to the employer and employer association defendants, the district court ruled that they were "liable injunctively" for the Union's hiring hall discrimination on a "theory of respondeat superior." App. 189a.

Based on these findings of liability, the district court granted relief in two forms. First, the district court granted compensatory monetary relief—in amounts ultimately agreed upon by the parties—to all actual victims of the Union's discrimination, who were specified by name. App. 208a-210a, 217a, 243a-252a. Second, the court issued injunctive relief to govern the future operation of the hiring hall. This injunctive relief included the racial quotas which, as subsequently modified, are the subject of this petition.

In the injunctive decree as initially entered, the racial quotas applicable to job referrals by the hiring hall were part of a broader injunctive scheme the ultimate

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[6] Each of the Union's five geographical districts had its own hiring hall and its own "out-of-work lists." Further, within each district, operating engineers were classified into several categories, based primarily on experience. Within each district, a separate "out-of-work list" was maintained for each of these categories. App. 34a-35a.

objective of which was to achieve specified goals set for the number of hours worked by minorities within the Union's jurisdiction. App. 224a-225a. The decree established a separate minority "hours" goal for each of the Union's five geographical districts which, by the fifth year of the decree, was a percentage equal to the percentage of minorities in the general workforce population in each district. To meet those goals, the decree imposed specific quota obligations on both the Union and the employer defendants. Pertinent here, the Union was required:

> "[i]n addition to the regular out-of-work lists contemplated by the collective bargaining agreement, [to] maintain out-of-work lists composed only of minority persons. . . ." [App. 225a].

The decree "authorized" the Union to make referrals to employers "directly from the minority out-of-work lists in response to employer requests for minority employees." *Ibid.* And, the decree *required* the Union to make sufficient referrals of minorities from the minority list so that "[t]he percentage of minorities referred by Local 542 . . . at least equal" the percentage established as the "hours" goal.[7] The decree further provided that "[if] . . . the goal for minorities' *hours* . . . has not been met in any district, the Magistrate may increase the minimum rate at which minorities must be *referred*." App. 225a-226a (emphasis added).

Similarly, each of the employer defendants was required by the decree to utilize sufficient minorities to meet the

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[7] In the first year of the decree the percentages specified by the decree were approximately equal to the percentage of minorities admitted to Union membership in each district. By the fifth year of the decree, the percentages were based upon the percentage of minorities in the general workforce in each district. The decree apparently assumed that by the fifth year, as a result of a separate racial quota in the decree which governed admission to Union membership, the percentage of blacks in the Union in each district would equal the percentage of blacks in the general workforce in that district. App. 212a-213a, 215a, 224a, 226a.

"hours" goals. App. 230a. And, the decree prescribed specific means which the employers were to use to satisfy that requirement. App. 230a-232a.

In 1982, this Court in *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, ruled that the district court had erred in finding the employer and employer association defendants to have been "injunctively liable." This Court accordingly invalidated that portion of the injunctive decree which imposed obligations on the employers. On remand following this Court's decision, the Union contended that with the employers freed from all obligations under the decree, it was necessary to remove the "hours" goals from the decree, and particularly to remove the linkage between the hiring hall referral quotas and the "hours" goals. The Union pointed out that it was without power to achieve the "hours" goals: the only part of the process controlled by the Union is the making of job referrals; the employers retain the right unilaterally to decide whether to hire a person who has been referred, how long to retain any person in a job, and whether to recall an employee who has been laid off.[8] The Union argued that if, under these circumstances, the referral quotas were still to be tied to the "hours" goals, the Union—and more importantly its white members—would in effect be held responsible for the conduct of employers. The plaintiff class, on the other hand, argued that for precisely the reasons given by the Union it was even more important than before that the referral quotas be tied to the "hours" goals:

> It is clear to plaintiffs that even in the face of a continuing judgment, the contractors' commitment to

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[8] An employer has the unqualified right to recall any employee who has worked for that employer within a specified period of time prior to the recall (originally 90 days, and presently 30 days). Such recalls are in the sole discretion of the employer and are out of the control of the Union. As discussed *infra*, however, although the Union has no control over these recalls, such recalls are counted in determining whether the Union has satisfied the referral quotas.

> minority utilization has flagged significantly. . . . It can only be expected that once the employers are relieved of all affirmative minority utilization obligations, minority *hours* will dwindle even more dramatically without some immediate, counterbalancing increase in the *referral* quotas.[9]

In its amended Judgment and Decree, issued on August 12, 1983, the district court, while removing the employer obligations from the decree, determined to retain the link between the "hours" goals and the referral quotas. App. 259a-260a. Indeed, in that very amended decree the court increased the referral quotas because, although the Union had met its obligations under those quotas, the "hours" goals had not been met in the previous year. App. 259a.

The following June, 1984, plaintiffs proposed that the referral quotas for minorities in District 1 and District 5 be raised yet again. Plaintiffs pointed out that in District 1, while the Union had been meeting the then-imposed referral quota (giving minorities 30% of the hiring hall referrals), minorities in that District had only worked 12% of the total hours, far short of the 18% "hours" goal for that District.[10] The district court, on July 24, 1984, responded to plaintiffs' request by ordering that the minority referral quotas be raised to 40% in District 1 and 17% in District 5. App. 14a-17a.

At the time of this order the minority membership in District 1 was 13%, and the minority membership in District 5 was 7%. Thus, in District 1, as a result of this order the decree requires that 40% of the referrals go to the 13% of the members who are minorities. Indeed, the effective hiring hall referral quota is much higher. The decree counts as "referrals" employer recalls, over

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[9] Memorandum in Support of Plaintiffs' Proposed Revised Judgment and Decree, February 7, 1983, at pp. 7-8 (emphasis added).

[10] Plaintiffs' Brief in Further Support of Their Proposal To Prospectively Remedy Minority Hours Shortfall, June 28, 1984.

which the Union hiring hall has no control. App. 19a. See note 8, *supra*. In the quarter preceding the court's order increasing the minority quota in District 1 to 40%, 12.8% of employer recalls in District 1 had gone to minorities, while 36.2% of hiring hall dispatches had gone to minorities.[11] In order to meet a 40% referral quota in District 1 the Union hiring hall is required to give far more than 40% of all dispatches to minorities so as to compensate for the shortfall in minority referrals resulting from employer recalls.[12]

The Union's hiring hall is exclusive. Except for their limited right to recall workers, see note 8, *supra*, employers who have contracted with the Union are obligated to hire operating engineers only from among those dispatched by the Union. Workers affiliated with the Union are barred from seeking work with those employers except through Union referrals. Most operating engineers who are laid off from a job, minority and non-minority, must rely on a dispatch from the hiring hall—as opposed to an employer recall—in order again to practice their trade. For white members who must rely on the hiring hall, the consequence of the referral quotas is devastating. In District 1, with well in excess of 40% of the dispatches going to minorities who comprise only 13% of the operating engineers in that district, the minority out-of-work list turns over much more rapidly than the regular—

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[11] Petition of Local 542, I.U.O.E. for Reconsideration of Post Decree Order No. 78, and for Modification, Revision and Clarification of the Revised Judgment and Decree, as Amended, August 1, 1984, p. 8. The comparable figures in District 5 for the month of July 1984 were as follows: employers gave 9.43% of recalls to minorities, while the hiring hall gave 31.25% of dispatches to minorities. *Ibid.*

[12] In a recent report, the Master appointed to oversee implementation of the decree found as fact that: "In order to achieve [the 40% referral quota in District 1], in excess of 70 per cent of all *dispatches* would have to be to minority operators." Master's Interim Report on Year 4 and Year 5 Minority Hours and Wages, at p. 8 (emphasis by the Master).

integrated—out-of-work list. A white operator who is laid off at the same time as a minority operator must go to the bottom of a lengthy out-of-work list which moves with increasing slowness, while the minority operator goes to the bottom of a short list that moves relatively quickly. The minority operator will have the opportunity for a dispatch from the hiring hall long before the white has such a chance.

The quotas extend this preference to minorities solely because they are minorities, and without regard to whether they were victims of any discrimination by the Union. In fact, many of the beneficiaries of the decree were not even of working age at the time the discrimination found by the district court was ended. And, as discussed *supra*, at 7, all actual victims of that discrimination received monetary compensation for the losses they had suffered as a result of the discrimination.

Decisions Below

Immediately after the district court's order of July 24, 1984, the Union moved, *inter alia*, for reconsideration of that order and for modification of the injunctive decree based on this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984). In particular, the Union moved, based on *Stotts*, that the referral quotas in the decree be terminated. By order on September 27, 1984, the district court refused to alter the referral quotas, declaring *Stotts* inapplicable in a single sentence:

> The recent Supreme Court case, *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), is not applicable to the instant case and does *not* require any modification of the Judgment and Decree, including the termination of the quota requirements. [App. 18a, emphasis in original.]

On appeal, the Third Circuit affirmed the district court's ruling "that *Stotts* is inapplicable to the present controversy." App. 10a. The Third Circuit held that not-

withstanding *Stotts*, the referral quotas in this case are remedies that courts are authorized to award under both Title VII and § 1981.

With respect to Title VII, the Third Circuit interpreted *Stotts* as addressing the "narrow question . . . whether Title VII authorized a district court to modify a consent decree . . . in such a manner as to override a bona fide seniority system." App. 6a. The Court found that the *Stotts* holding did not apply here because:

> First, . . . *Stotts* concerned the modification of a consent decree, in a situation where there had been no finding or admission of unlawful discrimination, intentional or otherwise. The case at hand involves an injunctive decree, entered after a long trial, designed to remedy a judicial finding of intentional class-wide discrimination. . . .
>
> To accept Local 542's invitation to extend *Stotts* to a case where there has been a judicial finding of intentional discrimination would create a conflict with prior holdings of this Court and other Courts of Appeals. As the Seventh Circuit has pointed out, "the Court [in *Stotts*] did not hold that non-minority employees can attack a consent decree that remedies the effects of *proven discrimination*." *Grann v. City of Madison*, 738 F.2d [786] at 795 n.5 [7th Cir., *cert. denied*, 105 S. Ct. 296 (1984)]; *see also EEOC v. Local 638* [*Sheet Metal Workers Int'l Assn.*], 753 F.2d [1172] at 1186 [(2d. Cir.), *cert. granted*, No. 84-1656] (distinguishing *Stotts* in part because *Stotts* did not involve judicial finding of intentional discrimination); *N.A.A.C.P. v. Detroit Police Officers Ass'n*, 591 F. Supp. 1194, 1202 (E.D. Mich. 1984) (same).
>
> Second, and perhaps more importantly, *Stotts* involved a concededly bona fide seniority system, and thus addressed the problem of balancing rights of innocent non-minority employees against minorities suffering the effects of past discrimination. Here, however, the referral system, which operates on sen-

> iority principles, was found by the district court to be not bona fide. . . . [App. 8a-9a.]

The Third Circuit dismissed the *Stotts* Court's discussion of § 706(g), the provision establishing the remedial authority of district courts under Title VII, as follows:

> The [*Stotts*] Court went on to comment that [the] result [in that case], mandated by § 703(h), is also "consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation." *Id.* at 2588-89. That policy was construed by the Court to limit "make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* at 2589. The Court cited legislative history in which it stated broadly that "Title VII does not permit the ordering of racial quotas in business or unions." *Id.* at 2589. Most of the history cited, however, is ambiguous in its definition of an "actual victim of discrimination." More importantly, all of this discussion is framed in terms of the "policy of § 706(g)," and the actual legal mandate for the *Stotts* decision is § 703(h) which is limited to bona fide seniority systems. If this section of the opinion were construed expansively to forbid all class-based affirmative relief in Title VII actions, it would conflict with clear holdings in eleven Courts of Appeals, including ours, that Title VII authorizes such relief. See *Stotts*, 104 S. Ct. at 2606 n.10 (Blackmun, dissenting). It seems unlikely that the Court would reverse so many court of appeals decisions *sub silentio*, and no subsequent lower court decision has interpreted *Stotts* to have gone so far. Six Circuits have addressed the issue, and each has read *Stotts* narrowly to prohibit courts from modifying consent decrees, entered without a finding of discrimination, in such manner as to override bona fide seniority systems. *See Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985) [*pet. for cert. pending*, No. 85-177]; *Diaz v. American Telephone &*

Telegraph Co., 752 F.2d 1356 (9th Cir. 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985) [*cert. granted*, No. 84-1999]; *EEOC v. Local 638 Sheet Metal Workers' Int'l Assn.*, 753 F.2d 1172 (2d Cir. 1985) [*cert. granted*, No. 84-1656]; *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S. Ct. 296 (1984). [App. 6a-7a.]

With respect to § 1981, the Third Circuit stated:

> [T]his case involves a judicial finding of intentional class-wide race discrimination. As such, liability was established under both Title VII and 42 U.S.C. § 1981. The latter statute, which requires proof of intent, does not contain a § 706(g), and therefore to the extent that that section limits remedies in the Title VII conte[x]t, wider relief may be available under § 1981 where a showing of intentional discrimination can be made. The Supreme Court in *Stotts* expressly left this question open. 104 S. Ct. at 2590 n.16. At least one court has found that *Stotts* does not apply to intentional violations of the Fourteenth Amendment. *N.A.A.C.P. v. Detroit Police Officers Ass'n*, 591 F. Supp. [1194] at 1202-03 [(E.D. Mich. 1984)]. The court noted that two weeks after deciding *Stotts*, the Supreme Court denied certiorari in a case involving the override of a seniority system by an injunctive remedy in an equal protection clause case. *Buffalo Teachers Federation v. Arthur*, *cert. denied*, 104 S. Ct. 3555 (1984); *see also Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir. 1982) ("once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination."), *cert. denied*, 459 U.S. 827 (1982); *but cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977) (§ 703(h) provides a defense to employment discrimination claims brought under § 1981 as well

as to actions under Title VII), *cert. denied*, 439 U.S. 1115 (1979). [App. 10a].[13]

REASONS FOR GRANTING THE WRIT

Whether racial quotas are remedies that courts are authorized to award in employment discrimination cases is an important and recurring issue under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. This case squarely presents that issue under both statutes: The defendant was found by a court after trial to have engaged in intentional discrimination in violation of Title VII and § 1981. The court-ordered quotas benefit minority workers based on their status as minorities and without regard to whether they were victims of any discrimination by the defendant. The actual victims of the discrimination found by the district court received monetary compensation for losses resulting from wrongfully denied job opportunities in the *past*, and did not need preferential treatment to be assured of non-discriminatory access to *future* job opportunities.[14] And, as a result of the racial preferences required by the quotas, innocent white workers are deprived of opportunities to practice their trade.

Already this Term, this Court has granted petitions for certiorari in two cases raising the question whether racial quotas are permissible remedies for Title VII violations: *Local 638 . . . , Local 28 of the Sheet Metal Workers' International Association, et al. v. Equal Employment Opportunity Commission, The City of New York, et al.*, No. 84-1656 (petition for writ of certiorari granted, October

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[13] On July 31, 1985, and October 9, 1985, the district court entered orders extending the injunctive decree, including the racial quotas described above, for two additional years. Pursuant to those orders the decree at issue here will remain in effect at least until August 31, 1987.

[14] Because an integrated out-of-work list, which accords priority for referrals based on length of time out of work, provides an objective non-racial means of allocating job referrals, all that is needed to assure future non-discrimination is enforced adherence to the priorities estalbished by such a list.

7, 1985); and, *Local Number 93, International Association of Firefighters v. City of Cleveland, et al.*, No. 84-1999 (petition for writ of certiorari granted, October 7, 1985). At the least, the instant petition should be held pending this Court's decision of those cases on the merits. We submit, however, that there are reasons to grant the writ in this case without awaiting the outcome of those cases. The instant case raises the question whether racial quotas may be ordered as relief for § 1981 violations; neither of the two pending cases appears to do so.[15] And, as explained *infra*, at 19-20, a decision by the Court on Title VII alone will not, as a practical matter, settle the important question of the availability of court-ordered quota remedies in employment discrimination suits—especially if the decision is that Title VII does not authorize such remedies. Moreover, the issues in the present case are clearly drawn, without the procedural and factual complications of the two pending cases.[16]

The issue of court-ordered racial quotas as remedies in employment discrimination cases has long been the focus of legal and social turmoil. The issue needs to be resolved definitively, and finally put at rest. The questions raised in this petition are worthy of this Court's plenary consideration.

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[15] The petition in *Local Number 93* does not purport to raise any issue respecting § 1981. And, the court of appeals in that case analyzed the propriety of the racial quotas at issue there only under Title VII and not under § 1981. However, the complaint in the case was premised, *inter alia*, on § 1981, and presumably so was the consent decree containing the racial quotas.

[16] In *Local Number 93*, the quota issue arises in the context of an attack on a consent decree by a third party. The case could turn on whether a court may enter a consent decree that includes agreed-upon remedies that would not be authorized by the applicable remedial statute were the court acting without consent. In *Local 638*, the quota issue is interwoven with issues relating to findings of contempt and remedies for contempt. Neither case presents the quota issue in the pure, unadorned form in which the issue is presented here.

1. *Title VII.* In *Stotts*, this Court stated that court-ordered racial quotas benefiting persons who were not the victims of any unlawful employment practices of the defendant at the expense of persons of a different race who have done no wrong "run[] counter to [the] statutory policy" of Title VII as expressed in § 706(g). 104 S. Ct. at 2590 n.17; see also *id.* at 2588-89. The court below dismissed that statement as merely a "discussion . . . framed in terms of the 'policy of § 706(g)'" and, in any event, as *dictum*. The Third Circuit is not alone in this treatment of the § 706(g) portion of the *Stotts* opinion. See, *e.g.*, *EEOC v. Local 638 . . . Local 28 of the Sheet Metal Wkrs*, 753 F.2d 1172, 1186 (2nd Cir. 1985), *cert. granted*, 54 U.S.L.W. 3191 (Oct. 7, 1985) (No. 84-1656); *Paradise v. Prescott*, 767 F.2d 1514, 1528-1530 (11th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-824 (11th Cir. 1985); *pet. for cert. filed*, 54 U.S.L.W. 3149 (July 31, 1985) (No. 85-177); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985), *cert. granted, sub. nom. Local No. 93, International Association of Firefighters v. City of Cleveland*, 54 U.S.L.W. 3191 (Oct. 7, 1985) (No. 84-1999); *Britton v. South Bend Community School Corp.*, —— F.2d ——, 39 FEP Cases 170, 180-181 (7th Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.9 (9th Cir. 1985) (*dictum*).

But in *Stotts* this Court did more than make a naked statement of the "policy" of § 706(g). The Court quoted statement after statement made by sponsors and key supporters of Title VII in both houses of Congress that § 706(g) does not permit courts to order racial quotas. 104 S. Ct. at 2589-90.[17] Other than to term the legislative history recited in *Stotts* "ambiguous" (App. 6a),

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[17] Thorough reading of the legislative history of Title VII reveals numerous other statements consistent with those recited in *Stotts*, and no support for a contrary interpretation.

neither the court below nor any other court that has similarly disregarded the § 706(g) portion of *Stotts* has attempted to come to grips with the legislative history of § 706(g), much less to provide a cogent justification for a contrary reading of the provision.

The question of the remedial power of the courts under Title VII is purely one of statutory interpretation. Section 706(g) is *the* provision in Title VII which creates and establishes the limits of that remedial power. And § 706(g) applies to all violations of Title VII, whether intentional violations or otherwise.[18]

As things now stand, this Court in *Stotts* has set out what appears to be a definitive interpretation of § 706(g). The lower courts have chosen not to heed that interpretation. This state of affairs cannot be left unresolved. In fairness to the litigants all around the country who are affected by this question, and, more important, to the people, minority and non-minority, whose daily lives are affected by the racial quotas being imposed by the lower courts, this question must be conclusively resolved by this Court, one way or the other.

2. *Section 1981.* The court below was correct in stating that this Court in *Stotts* expressly left open the question whether courts may order racial quotas as remedies for § 1981 violations. 104 S. Ct. at 2590 n.16. The practical importance of this issue is to a large extent a function of how this Court resolves the issue of court-ordered quotas under Title VII. If the Court should determine that racial quotas may not be ordered as remedies for Title VII violations, the question whether quota remedies

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[18] Indeed, the opening words of § 706(g) are "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, ..." The effort of the court below, and of other courts in the cases cited *supra* at 18, to avoid the § 706(g) analysis of *Stotts* on the ground that no intentioanl discrimination was found in *Stotts* is again mere judicial invention having nothing to do with the statute that Congress enacted. See App. 8a-9a.

may be awarded under § 1981 takes on great importance.[19] In that event, the validity of present and future court-ordered racial quotas in employment discrimination cases will not be settled until the § 1981 issue is resolved. And that question should not be left to linger. It is time that all those affected by court-ordered racial quotas—those who benefit from them, those who lose by them, and those who are called upon to impose them on their employees or members—have a certain answer to where they stand. Continuing legal uncertainty only serves to exacerbate the tensions that are inherent in the allocating of benefits and burdens along racial lines.

As the opinion below illustrates, the lower courts have been prepared to order racial quota remedies under § 1981—much like under Title VII—with virtually no analysis of the pertinent statutory materials. In the instant case, the lower court was content with noting that § 1981 "does not contain a § 706(g)" and citing to a district court opinion that reads this Court's denials of certiorari as if they were tea leaves. App. 10a. But, like Title VII, § 1981 and its remedial provision § 1988 are statutes and therefore must be construed according to the intent of Congress.

Like rights under Title VII, rights under § 1981 are rights that accrue to individuals. And, by the terms of § 1981 the rights established by that provision are to equality of treatment, not to preferential treatment. It has always been a fundamental maxim of our jurispru-

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[19] This is not to say that the § 1981 issue is without independent significance if this Court should decide that courts may order racial quotas as remedies for Title VII violations. There have been a number of employment discrimination cases in which quota remedies have been predicated on a violation of § 1981 alone or in conjunction with a violation of § 1983. See, *e.g.*, *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

dence that "the scope of the remedy is determined by the nature and extent of the . . . violations." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). That maxim contemplates that full relief to actual victims of a wrong is the determinant of the limits of appropriate, non-punitive, relief. The proponents of racial quota remedies under § 1981 would have to establish that the post-Civil War Congress that enacted §§ 1981 and 1988 intended to deviate from that maxim in order to provide a remedy that was unheard of in that day—indeed, unheard of until 100 years later. That position is untenable. Moreover, even if the quota issue under § 1981 were somehow thought to be left to modern judicial creativity, the limits of such judicial invention should at least be informed by the judgment made by Congress when it *did* focus on the quota issue in 1964.[20] If the Congress that enacted Title VII intended to prohibit quota remedies, should courts be left free effectively to circumvent this recent congressional judgment by imputing to the Congress that enacted §§ 1981 and 1988, without basis in the statutory materials, an "intent" to allow such remedies? [21]

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[20] Cf. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1349 (11th Cir. 1983); *Wattleton v. International Brotherhood of Boiler Makers*, 686 F.2d 586, 592 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977), *cert. denied*, 439 U.S. 1115 (1979); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 473-475 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Chance v. Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). But cf. *Bolden v. Pennsylvania State Police*, 578 F.2d 912, 921 (3d Cir. 1978).

[21] Section 1988 itself seems to contemplate the answer to that question:

> The jurisdiction in civil . . . matters conferred on the district courts by [*inter alia*, § 1981] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . . .

This provision bespeaks a congressional intention that points the courts to the explicit decisions respecting remedies made by Congress in such statutes as Title VII.

There is thus considerable reason to doubt that the court below was correct in its ruling that racial quotas benefiting non-victims and disadvantaging innocent persons may be ordered as remedies for a § 1981 violation. For now, the important point is that this question should be resolved at the earliest appropriate opportunity. This case affords that opportunity.

CONCLUSION

For the reasons set forth above, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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